

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
FLYNN, et al., : Docket #1:21-cv-02587-
 : GHW-SLC
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 Plaintiffs, :
 :
 - against - :
 :
 CABLE NEWS NETWORK, INC., : New York, New York
 : October 14, 2021
 Defendant. :
 : MOTION HEARING
 ----- :
 :

PROCEEDINGS BEFORE
THE HONORABLE SARAH L. CAVE,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

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THE CLERK: Your Honor, this is in the matter of Flynn et al versus Cable News Network, Inc., 21-civil-2587. Counsel, please state your appearance for the record.

MR. STEVEN S. BISS: Judge, good morning. I'm Steve Biss. I represent the plaintiffs.

HONORABLE SARAH L. CAVE (THE COURT): Okay. Good morning.

MS. KATHERINE M. BOLGER: Good morning, your Honor. I'm Katherine Bolger; I represent the defendants.

THE COURT: Okay. Good morning to both of you. So it's a little hard for all of us to hear with our masks on, but I'll try to do my best to be clear if you can do the same.

So we're here this morning on CNN's motion to dismiss the amended Complaint. And so, Ms. Bolger, would you like to start?

MS. BOLGER: I would, your Honor. Before I start, I have one sort of silly housekeeping matter.

THE COURT: Yes.

MS. BOLGER: I noticed last night while I was flipping through the exhibits nervously that the CMS tag had covered some of the exhibits. So I brought new copies. I've already given Mr. Biss a copy, but I wondered if I

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PROCEEDINGS

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could just hand these up to you all.

THE COURT: That's fine. Thank you for noticing that.

And, actually, then, before you get -- since we're talking about exhibits, before you get started, so I don't interrupt your flow, in footnote two of the amended complaint, the Flynns allege that on July 7, 2020, CNN published the video. And then there are two links there, and it refers to an accompanying article written by Marshall Cohen. I didn't see that Cohen article among the exhibits. Did I miss it or --

MS. BOLGER: No, your Honor, we -- it's not the reported issue in the dispute, and we did not rely on that.

THE COURT: Okay.

MS. BOLGER: Although we would take the position that it, like everything else, is incorporated in the complaint.

THE COURT: Okay. I just wanted to make sure I hadn't missed something.

Okay, go ahead, Ms. Bolger.

MS. BOLGER: Your Honor, this is a defamation action that arises out a CNN report in which the plaintiffs are not named, are not discussed and don't speak and aren't the subject of the report. In fact, they're only shown in

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PROCEEDINGS

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two seconds of a clip that plaintiff Jack Flynn himself had posted previously on Twitter. In those few seconds of the clip Jack Flynn's brother, General Michael Flynn, recites the QAnon's words, "Where we go one, we go all."

THE COURT: Can I just stop you there? So you say that Mr. Flynn himself, Jack Flynn, posted the video? I know that the amended complaint alleges that General Flynn posted the video, but you're saying that Jack Flynn himself also posted the video to Twitter?

MS. BOLGER: He did, your Honor. And, actually, Exhibit 9, which I just handed up to you, is Mr. Flynn's Twitter. And you'll see not only did he post the video, but he says, "#take the oath happy fourth of July," and then he lists a bunch of other Twitter handles. So that is Jack Flynn's Tweet -- it's from July 5, 2020 -- of the video that is of Mr. Flynn and his family saying the words, "Where we go one, we go all."

THE COURT: Well, this is a re-Tweet of General Flynn's Tweet, right?

MS. BOLGER: Yes.

THE COURT: Okay. And is the whole video attached? This is just an image, but obviously, it's a printout, so maybe that's why I can see; but was it the whole video attached or just the image?

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PROCEEDINGS

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MS. BOLGER: Yes, your Honor. And then, actually, in the amended complaint on page -- one second -- page 13, this is the plaintiff's own complaint. You see there's a printout, and then the sort of fourth Tweet down in the image, he actually asked that it be re-Tweeted again, Jack Flynn, the last thing.

THE COURT: Sorry, the one on page 13?

MS. BOLGER: So page 13, the last Tweet in the story --

THE COURT: Oh, I see, yes.

MS. BOLGER: -- it says, "Joe, can you repost the oath we took on the Fourth?"

THE COURT: Got it. Okay. Thank you.

MS. BOLGER: So from this fleeting appearance, the plaintiff has concocted a defamation claim in which he says CNN accused him of being a racist, an extremist, an anti-Semite and a bunch of other things. But the Court should dismiss the complaint because the CNN report doesn't say any such thing. In fact, the only thing the report actually says about the Flynn's is that they were standing next to their brother Michael. And even if your Honor construes the report as containing some kind of defamatory meaning that the Flynn's are associated with QAnon, well, your Honor, the plaintiffs' own complaint establishes that

1 PROCEEDINGS 7

2 they themselves have probably associated themselves with
3 QAnon.

4 THE COURT: Well, that's "publicly associated
5 with"; is that equal to "follower," which is what the CNN
6 video says?

7 MS. BOLGER: Well, the CNN video doesn't say
8 that, your Honor. They --

9 THE COURT: Well, the chyron says "QAnon
10 follower," and it has their picture on it. So it's
11 labeling them a QAnon follower.

12 MS. BOLGER: Well, no, your Honor; what the CNN
13 chyron in that one freeze frame of that one one-and-a-half-
14 second of the larger report says is CNN goes inside a
15 gathering of QAnon followers, so it doesn't actually say
16 they are QAnon followers. And --

17 THE COURT: Wait, wait, wait, wait. How can you
18 say that?

19 MS. BOLGER: Well, it says they go inside a
20 gathering. Right? It doesn't say these are QAnon
21 followers; it just says they go inside a gathering. I just
22 wanted to make sure I was correctly quoting the sentence.

23 THE COURT: Yes, but that's a picture. And right
24 below the picture it says, "QAnon followers." How is that
25 not calling them QAnon followers?

1 PROCEEDINGS 8

2 MS. BOLGER: Well, your Honor, because it's one
3 frame of a full report. And the law is very clear in Rhode
4 Island and in New York that in assessing defamatory
5 meaning, the Court has to look at what CNN actually
6 distributed, not what the plaintiff chooses to freeze
7 frame, but what CNN actually distributed. And here, taking
8 the context as a whole, the report is actually not about
9 the plaintiffs at all. The report actually talks about a
10 QAnon gathering in Arizona, which is, your Honor, why I'm
11 mentioning the word "gathering," because the report is
12 actually about a gathering, a specific gathering, not this
13 one.

14 And in the report, Donie O'Sullivan, who's the CNN
15 commentator, says to the audience that there's this QAnon
16 following, and he shows someone playing the guitar and
17 singing the song, "Where we go one, we go all." And then
18 he says that that QAnon slogan has been endorsed by Michael
19 Flynn. And after he says that, they show this quick clip,
20 and then it goes back to talking about Michael Flynn's
21 refusal to disavow QAnon and President Trump's refusal to
22 disavow QAnon.

23 THE COURT: Right.

24 MS. BOLGER: That's what the report says. There
25 is no precedent for simply basing a defamation claim on one

1 frame; you have to look at the report as a whole.

2 THE COURT: Well, right. But the report -- I've
3 watched the video many times, and the report is various
4 clips of that meeting, and there are pictures of the people
5 at the meeting. There are people at -- and then there are
6 clips of the January 6 riot, and there are other clips of
7 various people. And the tone of the whole report is these
8 people, everybody that we're showing you is a QAnon
9 follower. So isn't that the context of the whole report,
10 that anybody you're seeing is a QAnon follower?
11

12 MS. BOLGER: Well, no, your Honor; you're
13 supposed to look at the words that are actually contained
14 in the report, not the context -- not the way the plaintiff
15 chooses to characterize it. The report itself discusses
16 only that Michael Flynn said these words and has supported
17 QAnon. That's the only context that this is used. There's
18 no connection. There's none of the connective tissue that
19 your Honor is talking about, you know, implying that these
20 people are engaging in this behavior. None of that
21 connective tissue is in the report. It's in the complaint,
22 but it's not in the report, and you should focus on --

23 THE COURT: But then your whole defense is, well,
24 they are QAnon followers, so it's okay that we called them
25 QAnon followers. So you're contradicting yourself.

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PROCEEDINGS

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MS. BOLGER: No, your Honor, we're not contradicting ourselves. The report doesn't say they're QAnon followers. The only thing the report says about the plaintiffs is that they were standing next to their brother when he said, "Where we go one, we go all." That's the only thing the report says.

If your Honor chooses to disagree with me and believes that the report associates them with QAnon, then I do think, your Honor, if you were to accept that interpretation, which to be clear, I don't think you should, they are -- they have associated themselves with QAnon in several ways that I can show you in the complaint. Right? Not only did Mr. Flynn say the -- and Mrs. Flynn say the words, "Where we go one, we go all," and post that video to Twitter, to re-Tweet it to Twitter so that he could get hundreds of thousands more followers, but also throughout the complaint the plaintiff himself selected Tweets that show his affiliation or their association with Q. And I can just pop through --

THE COURT: Again, you're equating the word "follower" with "association" or "affiliation." And I'm not sure that that's the right thing. I'm not sure a juror would equate all three of those verbs as the same thing.

MS. BOLGER: Well, your Honor, in a defamation

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PROCEEDINGS

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case the literal truth is not required. Right? It is not the case that your Honor needs to parse "follower" to mean one thing. Substantial truth is required. Right? And in the *Tannerite* case and the *Cabello-Rondon* case what the Second Circuit actually said was that the plaintiff had to plead facts that establish material falsity and substantial truth, which is a squiffier -- that's a legal term -- definition than literal truth -- establishes the truth here. And here, your Honor, it's impossible to suggest that the substantial truth of the QAnon allegation is not established when the plaintiff himself Tweets out -- and it's in the complaints --

THE COURT: Page 13 and 14.

MS. BOLGER: -- at page 15, a giant Q that says, "Where we go one, we go all," and says, "If this means you believe in the Constitution and equal justice under the law, then this works for me." Your Honor, the substantial truth is that Jack Flynn has willingly chosen to associate himself with QAnon. There's no question about that. I can read all of the other ones that are in here or Exhibit 12, my sort of one in Exhibit 12 that I think is so persuasive.

THE COURT: But they also say we're not QAnon followers. They allege that. I have to assume that that's true.

1 PROCEEDINGS 12

2 MS. BOLGER: But you don't, your Honor,
3 because --

4 THE COURT: I do. Well, it's a motion to dismiss.
5 I have to take it as true that they say they're not QAnon
6 followers.

7 MS. BOLGER: The *Iqbal* decision itself actually
8 defines "plausibility" in a way that is inconsistent with
9 what Mr. Biss argues in his papers. The *Iqbal* decision
10 itself actually defines "plausibility" and it says that the
11 Court should assess plausibility by, quote, "drawing on it
12 is judicial experience and common sense." Right? That's
13 what *Iqbal* says. So you are not required to just blindly
14 accept what's in the complaint; you're allowed to draw on
15 your judicial experience and common sense.

16 And more than that, your Honor, there's a case we
17 cited in the brief, the name of which I will get in one
18 second, that says when allegations in a complaint are
19 actually contradicted by other allegations in the
20 complaint, you're not obligated to rely on them. And here,
21 your Honor, that's what's happening here. First of all,
22 your Honor, the plaintiff says, well, I just said this
23 because it was a family gathering, and I said it out of
24 support for my family. Well, the plaintiffs' own complaint
25 contradicts that. The last several pages of the complaint,

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PROCEEDINGS

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pages 19 through 23, have Tweet after Tweet after Tweet by other people using the hashtag "take the oath" and associating it with QAnon. Right? That contradicts plaintiffs' own allegation that this was just a family thing to say. The article, in footnote four, The Washington Examiner story, which was written at the time of the original posting, the July 4th video, has a Washington Examiner article which itself says, "This is the QAnon oath. Take the oath of the QAnon movement." Everything the plaintiffs are saying is contradicted by their very own exhibits. And under those circumstances, your Honor, you're not required to take the plaintiffs' representation as truthful.

THE COURT: So this case is a little bit unusual in that, as you say, CNN doesn't state the words, "The Flynns are QAnon followers," but there's their picture and then there's the chyron below it. What's the closest case here, from your perspective, as that not being a statement? So what's your strongest case for me to believe that CNN did not state that the Flynns were QAnon followers based on the chyron and their image?

MS. BOLGER: I think, your Honor, the closest cases are the -- the *Marcil* case, which is actually a Rhode Island Court of Appeals case.

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PROCEEDINGS

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THE COURT: Yes.

MS. BOLGER: In the *Marcil* case what the Court says is you're not supposed to add innuendo or any kind -- you're not supposed to introduce new matter or enlarge the meaning of words to give to language a construction it will not bear. What the plaintiff is saying is that you have to ignore the evidence of what the report actually says and impose this idea that they're QAnon followers. I don't think, your Honor, that it has that meaning.

There are all kinds -- the *Bray* case in Rhode Island is a case that says you have to construe this broadly. The *Mann v. Evel* case, which is a New York Court of Appeals case, which we didn't cite because at the moment we're agreeing Rhode Island law applies, says that you have to construe the subheadline in connection with the much larger argument. And there's case after case in New York, which just frankly has more defamation law than Rhode Island because we have more --

THE COURT: Yes, I've noticed.

MS. BOLGER: -- organizations. Right? So there is the -- in this court there was the *Cummings* case that was just decided. In this court there was the *BY* case that was just decided. These are all cases where what the court says is you can't just base it on one thing; you have to take a step back

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PROCEEDINGS

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and look at the report. So that's the line of cases, your Honor, that I think give us the strongest support for the fact that it doesn't convey the [indiscernible].

THE COURT: Okay. Let's talk about the limited-purpose public figure versus private figure. So you allege that Jack Flynn is a limited-purpose public figure, at least, if not a public figure. How does just having a famous brother and Tweeting get you out of being a private person?

MS. BOLGER: So it wouldn't, your Honor, and I didn't argue that it does.

THE COURT: Okay.

MS. BOLGER: So the regime for establishing a limited-purpose public figure, which was actually created in *Gertz v. Robert Welch*, is the idea that a person becomes a public figure by stepping into a preexisting controversy and seeking to influence its outcome. That's the Gertz test, and there's a Rhode Island case we cited in the [indiscernible].

Your Honor, here there was, of course, a preexisting public controversy regarding QAnon and, frankly, Michael Flynn himself. Jack Flynn stepped into that controversy by doing a couple of things. One is you can tell from many of the Tweets he was an aggressive

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PROCEEDINGS

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supporter of his brother and his brother's dismissal -- the dismissal of the charges against his brother. He also was an aggressive promoter of the video of him saying, "Where we go one, we go all." That's at page 13 of the complaint, your Honor. That's where he asks to repost the oath video -- that's what he calls it, "the oath video." In addition, he's an aggressive seeker of eyeballs. Right? He goes from 100,000 Tweets to more than 200,000 Tweets in one day by promoting his "Where we go one, we go all," video. And we cited cases in our brief, your Honor, where increasing -- making publications that increase your Twitter promotion actually make you into a public figure. Those are in our brief.

THE COURT: But his -- the number of his followers is not in the complaint, though, right?

MS. BOLGER: No, your Honor, but you can take judicial notice of it.

THE COURT: Okay.

MS. BOLGER: I mean, he relies heavily on his Twitter feed. It's integral to his complaint and --

THE COURT: He relies on these Tweets. He doesn't rely on his whole feed.

MS. BOLGER: Well, but in the -- first of all, I think under the *Chambers* case, which is a Second Circuit

1 PROCEEDINGS 17

2 case, the Court would say that anything that he relies on
3 in the complaint becomes part of the complaint. And --

4 THE COURT: Right. Which is --

5 MS. BOLGER: And there's Judge Abrams'
6 [indiscernible] a fantastic Judge Abrams' case, which
7 begins with a G -- hold on one second -- sorry. And in
8 that case Judge Abrams actually takes judicial notice of
9 Tweets other than the ones that are actually put into the
10 complaint by the plaintiff because those Tweets are
11 integral to the complaint and because the plaintiff can't
12 be allowed to say some things are in it but some things are
13 not. So there is actual precedent for relying on those
14 Tweets.

15 THE COURT: Okay. All right, so then let's talk
16 about Mrs. Flynn. So, clearly, she's a private figure;
17 there's no dispute about that.

18 MS. BOLGER: Not at the moment, your Honor.

19 THE COURT: How hasn't she at least alleged
20 negligence -- we're just talking about Rule 8 here, and
21 there are several obligations, paragraph 20,
22 paragraph 23(c), where she alleges, for example, CNN could
23 have called the Flynns or taken other steps to confirm?

24 MS. BOLGER: Because none of those actually would
25 constitute negligence. So, first of all, your Honor, her

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PROCEEDINGS

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primary argument that there is -- that the defendant acted with negligence is two-fold. Her primary argument is if they had looked at my Twitter feed, they would have known I wasn't as QAnon supporter. And her secondary argument is they're a wing of the Democratic party, and they act with bias.

I'll take those in reverse order. The bias argument, of course, has been rejected by every single Court that's ever heard it, most recently, in the *Arapaho* case in DDC and the *Dershowitz* case in the Southern District of Florida.

As to the first part, that they already went back and looked at her Twitter feed and would have known that she wasn't a QAnon supporter, well, that's completely undercut by Exhibit 13 in which she Tweets and re-Tweets QAnon slogans. Right? So, in fact, had CNN gone back and looked at Ms. Flynn's Twitter feed, it would have confirmed the truth of the allegedly defamatory implication that plaintiff seeks to graft onto this one report.

THE COURT: Right. I thought that bias -- you know, certainly bias or a failure to investigate is not enough for actual malice. But for negligence, you're saying that bias isn't enough for negligence?

MS. BOLGER: Bias is not enough for negligence.

1 PROCEEDINGS 19

2 THE COURT: Okay.

3 MS. BOLGER: Negligence is a departure from a
4 standard of care. A standard of care is not
5 [indiscernible] bias -- objective standard of care.

6 THE COURT: Okay. I'm sorry. I keep interrupting
7 you. Go ahead.

8 MS. BOLGER: That was going to be it on the
9 negligence issue --

10 THE COURT: Okay. Yes.

11 MS. BOLGER: I think the only other claim to
12 discuss is the false -- oh, your Honor, there is the fact
13 that the plaintiff didn't technically comply with the Rhode
14 Island pleading requirements for defamation per se, and
15 then the requisite special damages. That is a quirk of
16 Rhode Island law. If it was a New York law, I probably
17 wouldn't be making the argument, your Honor. But the
18 allegations in the complaint of this sort of nebulous bad
19 acting is insufficient to --

20 THE COURT: Hold on one second. Hold on one
21 second. Okay, just hold on one second. We're going to
22 have to fix the recording. So if you can just bear with
23 us, and then I'll have you repeat the last thing that you
24 just said.

25 It's going now. Okay. So you were talking about

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PROCEEDINGS

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special damages.

MS. BOLGER: Yes. So, your Honor, the requirements of the Rhode Island law are that you have to plead defamation per se, which is to say defamation which harms you in your business. And if you don't plead defamation per se, you have to plead special damages. Here there's no allegations in the complaint that the particularly alleged defamatory meaning that the plaintiff seeks to ascribe to the CNN report damaged the plaintiffs in their business. It's unclear how it could damage your business as a seafood salesman in Rhode Island or as a homemaker and hairdresser. And more than that, there's insufficient allegations of special damages. The law is very clear that special damages need to be enumerated financial harm. There are no enumerated financial harms in the complaint; they're just not there.

Soi even if, your Honor, you disagreed with on everything else, fundamentally, he has not pled the claim of defamation per se with special damages.

THE COURT: Okay. Great.

MS. BOLGER: And the last thing, your Honor, is there is an intentional -- there's an invasion of privacy/false light claim. False light, actually, of course, doesn't exist in New York. But it is true in the

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PROCEEDINGS

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rest of the world that false light exists. But false light is bounded by the same things as the tort of defamation: substantial truth and actual malice. And the failure to plead either of those dooms your false light claim. So, your Honor, here we believe the claim should be dismissed.

THE COURT: Okay. Thank you.

All right, Mr. Biss, the floor is yours.

MR. BISS: Judge, good morning.

THE COURT: Good morning.

MR. BISS: May it please the Court, I'm Steve Biss, and I represent the Flynns.

Judge, I'm going to respond to the Court's questions and Ms. Bolger's responses. Of course, I'd be happy to answer any other questions. We have, as the Court knows, both parties filed detailed briefings.

THE COURT: Yes.

MR. BISS: With regard to the -- I'll start in the reverse order; I'll start with the issue of damages. So Jack Flynn is a businessman. And the complaint clearly alleges that the statements affect him or impute to him an unfitness to perform his duties and responsibilities as an executive of a seafood company or -- it doesn't matter, seafood company or any other company, it doesn't matter. He's a businessman. And with great respect to my

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PROCEEDINGS

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colleague, I would suggest to the Court that it is obvious if somebody gets labeled as being a follower of an extremist group, that's going to impact their ability to function an executive of a company. There are plenty of examples of executives being fired simply because they went to the January 6th or they participated in going to the Capitol on January 6th, plenty of examples. So that's with regard to Jack Smith *[sic]*.

With regard to Mrs. Flynn -- Jack Flynn -- with regard to Mrs. Flynn, who is clearly a private figure, the *Gertz* case controls. *Gertz* is the case. In *Gertz* -- I would just commend the *Gertz* case to the Court. You've probably read the *Gertz* case.

THE COURT: Yes, I have.

MR. BISS: It talks about what's required to prove in a private-figure case or a private-individual case. And special damages is not limited, as my colleague pointed out, is not limited to financial harm; it includes mental anguish, it includes insult, injury, humiliation, embarrassment. The Rhode Island Supreme Court has adopted that *Gertz* definition of actual injury, and that's what controls here. And Mrs. Flynn has clearly alleged that she suffered actual injury as a result of the publication.

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PROCEEDINGS

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And I would add this one fact. Shortly after this episode aired, she gets a text from her girlfriend, her next-door neighbor, that says that we saw you on CNN. And we allege in the complaint that the publication of these facts have caused both Flynns -- have caused actual injury to both Flynns. So under *Gertz* we've satisfied the pleading standard for special damages because special damages are not simply limited to financial harm. A homemaker, if you believe that a homemaker can't suffer harm by being accused of being a neo-Nazi or any other false or defamatory concept, I take great exception to that comment. Just because she's working at home doesn't mean that her reputation can't be soiled and wrecked by falsely attributing to her an affiliation that she doesn't have. So I would submit to your Honor we have satisfied the *Gertz* pleading standard for actual injury for Mrs. Flynn, and we have pled defamation per se for the reasons stated in our brief. And we cite a number of cases in our brief -- I won't go into those.

With regard to --

THE COURT: And I just pause you there for one second? Because --

MR. BISS: Yes, your Honor.

THE COURT: -- I think this question does relate

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PROCEEDINGS

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to damages. So in paragraph 19, I think it is, the Flynnns allege that they received threats, I believe it was. I assume that's part of your allegation of damages. Is there anything you can elaborate -- I think it's 19(d). Sorry.

MR. BISS: Sure. It is, Judge, it's by almost definition one of the classic ways that you can prove actual injury. So injury to reputation is measured by the value of your reputation before the publication measured by the value of your reputation after. So what you have to look at is the impact of the defamatory statements on your reputation. The fact of the matter is the Flynnns got death threats, the Flynnns got threats of bodily harm as a result of being falsely affiliated with QAnon or being QAnon followers. That's actual injury. That's injury to your reputation, that's injury to your name. And so the Court's correct to point that out, that we do allege here that there are facts in the complaint that show that they did suffer a tangible injury. For instance -- and this happens a lot with these nationwide publications. There are -- and I say this with great respect -- there are a lot of crazy people out there in the world. And part of the danger here of associating somebody with QAnon or associating them with neo-Nazis or other similar things, Judge, is that somebody shows up on your front step. These phone calls and these

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PROCEEDINGS

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voicemails are devastating to people.

THE COURT: So they received -- did people show up at their house --

MR. BISS: No. Nobody showed up at their house. That --

THE COURT: -- actually? Did they receive --

MR. BISS: -- was just an analogy. But they did receive death threats, they did receive phone calls. And we allege that in the complaint because this is what causes them enormous emotional and psychological injury is to have them threatened and then -- because you don't know what's going to happen next.

THE COURT: Right.

MR. BISS: If you're a public figure -- and I represent certain public figures -- if you're a public figure, you have the protection of the capitol police. Or if you're a member of the court, you have the protection of the federal police. The Flynns don't have any protection. So this was devastating to them. And those are facts that support the allegation of damages in this case.

THE COURT: Okay. So they received phone calls. Did they receive text messages or anything in the mail or anything else that would be additional facts supporting these threats, as opposed to just the simple assertion that

1 PROCEEDINGS 26

2 there were threats? Is there anything else you can tell
3 the Court about specifics on those?

4 MR. BISS: I can't without getting into the
5 specific evidence, without producing in discovery the
6 voicemails and those types of things, I can't -- I
7 haven't --

8 THE COURT: Categorically were there -- what form
9 did the threats come in? You said phone calls. Were there
10 also text messages or anything in the mail or anything in
11 person --

12 MR. BISS: Judge, I can't represent to you that
13 there were text messages or mailings. I can only tell you
14 that there were telephone calls.

15 THE COURT: Okay. Thank you.

16 MR. BISS: And I would just -- just to circle back
17 on that, to come full circle, I think that's enough. I
18 don't think I have to -- I mean, I don't think -- there's
19 no case I know of and no rule I know of that says that in
20 order to be able to allege damages, you had to have gotten
21 voicemails plus text messages --

22 THE COURT: I wasn't suggesting that there was. I
23 was just trying to find out -- you said -- the complaint
24 says threats; I was trying to find out how they arrived.
25 That's all.

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PROCEEDINGS

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MR. BISS: Yes, your Honor.

On the issue of negligence, again, I disagree with my colleague. The fact of the matter is it would have been pretty simple to pick up the phone -- and this is what they always do -- they pick up the phone -- they've already written their article, they pick up the phone, they call the Flynns, and they say, Do you have any comment? We're going to publish the article in two hours or we're going to public the broadcast, the segment in two hours. The fact is they didn't call. And that is negligence per se. For a reporter not to contact the source of an article or the source of a broadcast, that's enough to -- that fact alone.

The other thing is -- and I think your Honor pointed this out -- there was no effort to investigate other than apparently Jack Flynn re-Tweeted the video -- and I'll get to that in a moment -- no effort to investigate whether or not the Flynns were QAnon followers.

So for Mrs. Flynn, there's no question that the negligent standard has been satisfied. And for Jack Flynn there's no question, based on those facts alone, there's no question that the negligent standard, which is a very low bar, the negligent standard -- it's normally -- it's not my experience to have that particular aspect of the claim challenged. But I will say in this case the fact that they

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PROCEEDINGS

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didn't call the Flynns is enough to show that they were negligent.

Jack Flynn, it's alleged that he is a limited-purpose public figure. We disagree with that. He's a private individual. We allege that he's a private individual. Of course, it's the defendant's burden of proof to show that he's something other than a private individual. Ms. Bolger acknowledged, I think she confirmed to the Court, that simply Tweeting and being the famous brother of a -- having a famous brother is not sufficient. But she really didn't add anything more to that. She suggested that he was an aggressive supporter of his brother. Of course, I mean, the Flynn family aggressively support each other. They are a very tight family. They're a large family. But loving your brother or aggressively supporting your brother in an extremely difficult long-term prosecution does not make you a public figure. I don't know of any case that would show that.

She also said that he re-Tweeted the video. Judge, that doesn't make you a public figure. That would make everybody a public figure. Everybody who ever repeated that, re-Tweeted that video, would make them a public figure. That does not make Jack Flynn a public figure.

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PROCEEDINGS

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And then the other thing she said was that he promoted the video. And I think what she's referring to is where he says to his brother Joe -- and it's in the complaint -- go ahead and re-Tweet it or reshare it.

THE COURT: Right.

MR. BISS: Judge, that gets me -- I just want to address that for a moment. That's back in July of 2020. Okay? That has nothing to do with QAnon. When Jack Flynn says re-Tweet the video, it has nothing to do with QAnon. Ms. Bolger's taking Jack Flynn's re-Tweet in 2020 completely out of context to this case. It has nothing to do with being a QAnon follower. He's not saying, "I'm a QAnon follower. Re-Tweet this." He's just re-Tweeting because it is -- it supports his brother Mike. And that's what we allege in the complaint. And there's nothing more alleged here. Being an aggressive supporter of your brother, re-Tweeting something that you believe would help your brother, and telling your other brother to share it with somebody, I would respectfully submit doesn't make you a limited-purpose public figure, at least given the backdrop of where we are today in the proceedings. Okay? Where we are today is the 12(b)(6) stage. Of course, the defendant has the burden of proof, and they might -- in discovery they might discover that Jack Flynn has done

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PROCEEDINGS

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more. I doubt they will, but they may. Or they might find, as I've had in other cases, that he did less. We don't know. You don't know what it is. But on these facts and at this stage of the proceeding, there is -- given that the Flynns have alleged that they are private individuals specifically, that part of the motion should be denied. And, obviously, they can revisit it on summary judgment if they develop any facts.

THE COURT: Can I just pause you for a second? So in the complaint there are a couple of places that reference -- obviously, there are Tweets that are screenshotted and included in the complaint, but there are several places where the complaint references the Flynns' Twitter account or their Twitter feed generally. And they say if CNN had just looked at their Twitter feed, they would have seen that they were not QAnon followers. Why don't that open the door to me looking at everything that Ms. Bolger handed up to me and the rest of their archived Twitter feeds?

MR. BISS: Well, again, Judge, I think their -- she goes much further than Jack Flynn's Twitter feed. And with regard to Leslie Flynn, what they have attached as an exhibit is one Tweet that could not possibly be construed -- I couldn't even read it -- couldn't possibly

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PROCEEDINGS

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be construed as being evidence that you're a QAnon follower.

THE COURT: Right. I'm just asking in terms of considering for purposes of the motion to dismiss my being able to at least look at those additional Tweets that the defendants have submitted.

MR. BISS: Judge, I disagree with Ms. Bolger. I don't think that it opens the door to have you review every single Tweet that Jack Flynn ever published.

THE COURT: Okay. But what about at a minimum the additional ones that Ms. Bolger has given me?

MR. BISS: Well, again, I mean, again, I think the Court is limited to what's in the complaint. And I don't believe that -- and you'll note in our opposition we footnoted in several places that we believe they went way past the four corners of the complaint. So, again, that's our position with regard to the proffer of additional information by her. I don't think it alters or changes the needle -- whatever that metaphor is with regard to the stage of the proceeding that we're at. But even if the Court does consider it at this stage of the proceeding, it doesn't change the nature of it.

THE COURT: So I was pushing Ms. Bolger on the substantial truth point and I was suggesting that she was

1 PROCEEDINGS 32

2 conflating follower with association with affiliation.

3 And, you know, I'm really wrestling with that on this

4 motion and the posture that I'm in in which the Rhode

5 Island cases say that defamation is a question for the

6 Court but at the same time we're at the motion-to-dismiss

7 stage and it's just the sufficiency of the pleading. So

8 what can you tell me about -- even if I look at these

9 Tweets, these other Tweets that CNN has pointed me to, how

10 do I decide at this stage who is a follower or who is not a

11 follower?

12 MR. BISS: Judge, I think the Court hit it right

13 on the head. This broadcaster or segment, this special

14 report, clearly identifies in a sort of a staccato multiple

15 individuals who they all say are QAnon followers. And

16 included in that snapshot are Jack and Leslie Flynn. And

17 the Court has to look at the context in which it was

18 published. This article was published February 4 -- I say

19 "article" -- this broadcast, this segment -- if I keep

20 saying article, it's only because I'm used to that.

21 THE COURT: That's okay. I understand what you

22 mean.

23 MR. BISS: This publication was published on

24 February 4, 2021, within a month of the storming of the

25 Capitol. And I think, Judge, this whole idea about QAnon

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PROCEEDINGS

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being a violent extremist group, we didn't have that back in 2020. So the context of when this publication occurred is important because clearly Jack Flynn, when he re-Tweeted in 2020, there was no mention of QAnon being a violent extremist group. The FBI had not labeled them, the Department of Homeland Security had not labeled them. Other things we point to in the complaint are Congress -- Congress passed a piece of legislation in October -- it's in a footnote, Judge, in the complaint.

THE COURT: Yes. I was actually thinking about the FBI report or the FBI designation. Do you know when that occurred?

MR. BISS: I don't, Judge. I don't know when that was, but I can find that out for your Honor. But it -- as the election loomed and as the election passed and the post-election events occurred, there became a sort of a fixation on this QAnon. And the FBI and Department of Homeland Security clearly labeled them as domestic terrorists. Now, that's a -- you don't want to be -- no one wants to be associated with that. And I would suggest to your Honor that I think Ms. Bolger said common sense and use the idea of common sense. And the Court doesn't -- of course, nobody -- courts, juries, don't ever give that up at the door. But if you think about using the Court's

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PROCEEDINGS

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common sense, if you were affiliated with a violent extremist group, Judge, that would be defamatory per se about the Court, about anybody, defamatory per se. The best case -- and it's an unfortunate case because it had to -- it went through an appeal in the Sixth Circuit. We cite it. It's *Boulger v. Woods* -- and that's B-o-u-l-g-e-r -- versus *Woods*. And James Woods, the actor who was active on Twitter till he got banned, published a statement -- I'll say it's a statement, and I'll tell you why the Sixth Circuit said it wasn't a statement. And the statement was that is Ms. Boulger, is that Ms. Boulger giving the Nazi salute. And he put a picture of what was putatively Ms. Boulger in the Tweet. It turned out it wasn't Ms. Boulger; it was somebody else. But Ms. Boulger was at a Trump rally, and she's a Democratic operative, and the Sixth Circuit Court of Appeals said that by simply associating her with somebody who would give the Nazi salute, that is capable of a defamatory meaning. And the case was eventually reversed by the Sixth Circuit because they found that, whether you agree with this or not, they found that Mr. Woods was not -- he didn't make a statement, he asked a question. And it would seem to me that's -- you know, again, whether we agree with that or don't agree with that, that's a different issue. But that case clearly

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PROCEEDINGS

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demonstrates that when you falsely associate somebody with an extremist group, there's no question it's capable of a defamatory meaning. We cite other cases in the brief, as well. And we allege material falsity throughout the brief. I mean, if the Court wants -- I think we cited it enough in our brief. And it's clearly materially false under the *Masson* standard, under the *Masson v. New Yorker* standard because they were not followers, they were never followers, and it's all alleged.

THE COURT: Can you talk a little bit more about the actual, how you believe you've sufficiently alleged actual malice? If CNN is right that Mr. Flynn is in fact at least a limited-purpose public figure and therefore needs to show actual malice, how have you alleged that?

MR. BISS: Judge, I think there's three ways that, three factual ways that we allege actual malice. And I believe this is -- these are all stated in paragraph 23 of the complaint -- but I'll highlight three because I think that each one of these independently provide a sufficient plausible basis to support a finding of actual malice at this stage.

And the one thing I have to say to the Court in these defamation cases is when the cases proceed past 12(b)(6), you get to discover all sorts of other things,

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PROCEEDINGS

36

you learn all sorts of things about how the reporters went about gathering their evidence and these types of things. And so the landscape changes dramatically when you go to discovery. There's things you don't know that they did, things you don't know that a source told them. You don't know if they had any sources. So they could tell you in the article or in the broadcast they got a source that says X. And sometimes it turns out they have no sources; they just make it up.

So in paragraph 23(a) we allege that they made it up. They made up that Jack Flynn and Leslie Flynn are QAnon followers. They just fabricated it; they made it up. And we say that the way they made it up -- the way they knew it was false is because they reviewed Jack Flynn's Tweets. And if they reviewed his Tweets, they would have saw that he was not a QAnon follower at all. And we give the Court multiple examples to show how the -- how a reasonable jury could conclude that he wasn't a follower at all.

Now, the one that Ms. Bolger sort of highlighted to the Court is on page 15 of the complaint, the amended complaint. And this is the Tweet where Jack Flynn is actually -- and I do have to concede, Judge, I don't use Twitter. So --

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PROCEEDINGS

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THE COURT: I don't, either.

MR. BISS: -- if I've got my terms all wrong, I just want to be clear. I don't use Twitter because I'm often involved in litigation with them. So this is the one where he either re-Tweets or attaches somebody else's Tweet from "Escape the Matrix," whatever that is, whoever that is. Jack Flynn writes -- and this is all Jack Flynn -- and you'll see, just to reiterate another issue about supporting your brother -- of course, Jack Flynn's profile picture is a picture of General Flynn, and Jack Flynn repeatedly changed his profile message: "Jack Flynn, we fight back." He had all sorts of different hashtags, all of which were intended by Jack Flynn to support his brother. And he writes, quote, "If this means you believe in the Constitution and equal justice under the law, then this works for me." And it has attached to it a re-Tweet from "Escape the Matrix" with a big letter Q on it. That's far from being a QAnon follower. That's -- the jury could look at that and say what this guy actually means here is that if you support -- if QAnon supports the Constitution and equal justice under the laws of America, then they're not a violent extremist group, they're not dangerous. But Jack Flynn -- this could not be construed as being somebody who follows the QAnon movement. In fact, it begins with an

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PROCEEDINGS

38

"if." It begins with a question: "If this means."

So I would just suggest to your Honor that there is, number one is the allegation -- number one allegation on actual malice is that CNN, based on its review of Jack Flynn's Tweets, fabricated the claim that he was QAnon follower. And the reason that you want to bring the Flynns in in February of 2021 is because Michael Flynn is probably one of the most prominent supporters of Donald Trump and the Republican party. That's why -- why would they include the Flynns in this particular segment? Because they wanted -- they wanted to extend the -- they wanted to sensationalize the news and extend the reach of this. Not the Flynns, but CNN wanted to get more mileage out of General Flynn than this little barbecue video was intended for. So number one is the fabrication.

Number two, Judge -- and this is in 23(b) -- and 23(a) is a long -- there's other things we allege in 23(a). They disregarded the Tweets of Sydney Powell, just intentionally disregarded them as to the meaning of the General Flynn video. Paragraph 23(b), in 23(b) we allege that they deliberately altered the General Flynn video, and we allege that they did it in such a way that they took out the oath to America, the oath to the Constitution that the Flynns took. And they also took out the "God Bless

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PROCEEDINGS

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America." And they left it with, "Where we go one, we go all." So what we allege in the complaint -- and this is also pointed out in our briefing papers -- the they created a false insinuation that the Flynns were pledging an oath of allegiance to QAnon. By omitting the words, "God Bless America," the oath to the Constitution, they created a false impression in the minds of readers that the Flynns had pledged an oath of allegiance to QAnon and were therefor QAnon followers. That's the second factual basis for actual malice is their alteration of the record.

Number three is -- and this is in paragraph 23(c) of the complaint -- and we allege that in the wake of the storming of the Capitol, the accusation that the Flynns were QAnon followers -- because remember that the context of this particular publication is within a month of the storming of the Capitol, CNN is in the midst of a multiple -- I was thinking multi-city tour of QAnon, but on January 31, Anderson Cooper publishes a massive QAnon conspiracy segment, they come out with another segment February 26, so they're in the process of publishing statements linking QAnon to the insurrectionists, the mob that stormed the Capitol. And so the third factual basis for our claim of actual malice is that CNN knew the publication would cause a media frenzy, and they

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PROCEEDINGS

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deliberately and recklessly conveyed the false narrative about the plaintiffs to sensationalize the news. Those are the exact same allegations in the *Tomlin* case that we cite. Obviously, it's not binding on your Honor; it's as Fourth Circuit case, but in that case the television station deliberately and recklessly published false statements in order to create a sensational story. And those allegations were sufficient for the Fourth Circuit to find that there was an issue of fact on summary judgment. And that's what they did here. In the midst of all this controversy that was occurring regarding the storming of the Capitol, the riots, the insurrection, whatever the appropriate word is, because it seems to change a lot, but whatever happened on January 6th. And I think we can safely say that there were multiple -- there was a storming of the United States Capitol building, there were people who invaded the United States Capitol building. They called it an insurrection and then I think a couple of weeks ago or a month ago, maybe, Reuters came out and said the FBI changed it, it wasn't an insurrection.

THE COURT: People died.

MR. BISS: People died. It was a serious, serious breach of national security. And likely there's going to be some serious -- and people have been arrested, people

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PROCEEDINGS

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have been convicted, people pled guilty, and there's likely to be much more fallout on those issues. But this particular article or publication we allege was published by CNN in order to sensationalize these issues at a time when they knew that they could get the most out of these articles by linking the Flynns to QAnon during this time. So it's those three pieces, Judge, that we allege support the claim of actual malice in this case.

And actual malice, of course, has -- there's two purposes for actual malice. Number one is if you find that Jack Flynn is a limited-purpose public figure, we acknowledge that he has to allege actual malice. And I acknowledge it, but I -- and I've made this argument in repeated cases -- I never expect to win on the argument, but we of course view *New York Times v. Sullivan* as bad law. I've asked every Court to reconsider it. And, for the record, I have to ask your Honor to reconsider it.

THE COURT: That's a long shot with me.

MR. BISS: No, I understand. And I say that with respect to the concept of *stare decisis*. But I have to preserve that issue. Some Court's going to consider it. The same arguments were made by Sarah Palin, I think, to Judge Rakoff; and, of course, he denied her motion, as well. But -- and I want to just say that for the record.

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PROCEEDINGS

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But the other part of actual malice is for punitive damages. So we have to -- in order for both *Flynns* or either *Flynn* to go to a jury on a claim of punitive damages, they do have to, under *Gertz*, they do have to satisfy or plead actual malice. And there's other -- in the complaint there's other aspects of actual malice that are talked about in here.

And I just want to touch on the bias issue. So it's a little more complicated than -- and with great respect to Ms. Bolger -- it's a little more complicated than just saying, "Well, bias can never be evidence of actual malice." Bias, ill will, spite can be evidence of actual malice -- there's the *Duffy* case in the Second Circuit, and there are numerous other cases -- when -- bias and ill will and spite can be evidence of actual malice when the article is published with the intent to inflict harm. And that's what we allege in the complaint. So it's not simply that bias has no relevance whatsoever to the actual malice inquiry; it does have relevance. And I would say this: The Second Circuit in the *Celle* case, C-e-l-l-e, case said that when a Court looks at actual malice, it's a cumulative process. Okay? So the Court doesn't just go, well, there's one factor or two factors; you look at all the factors overall, and if all the factors would plausibly

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PROCEEDINGS

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lead to the conclusion that the defendant knew the statements were false or acted with reckless disregard for the truth, then they've satisfied the 12(b)(6) standard. And I think, Judge, it is important in this case -- in every case -- although -- to understand -- and what the Second Circuit has said in *LaLiberte* and *Palin*, and that is that the allegations in the plaintiff's complaint have to be accepted as true. And the reasonable inferences at this stage have to be drawn in favor of allowing the case to go forward to discovery. And the policies reasons behind that -- we don't often talk about the policy reasons -- but the policy reasons are so that the Second Circuit has a well-developed record. As I said before, there are things that you learn about even award-winning journalists. And sometimes you learn things about award-winning journalists and only in discovery. So --

THE COURT: It's also a risk for the plaintiffs, though, too.

MR. BISS: It's also a risk for the plaintiffs, there's no question about that. So, I mean, there are enough issues in these cases. But that's the policy behind the *Igbal-Twombly* argument is that we want the courts of appeals to have a well-developed record, we want the parties to -- we want to -- not to use 12(b)(6) as a means

1 PROCEEDINGS 44

2 of chilling litigation. So, again, Judge, we have -- I
3 think I've addressed all the issues. I'll be happy to
4 answer any --

5 THE COURT: You have. Just a couple of factual
6 points I just wanted to confirm. So the video -- the clip
7 that's the basis for the Flynn's claim is just the clip
8 that's included in the February 3rd Donie O'Sullivan
9 report? In other words, the video's not shown in the
10 January 31st Anderson Cooper, it's not shown in the
11 February 26th Anderson Cooper; it's just the February 3rd,
12 right?

13 MR. BISS: That's correct. And, Judge, I think
14 it's February 4, but --

15 THE COURT: February 4. I've seen it February 3rd
16 and I've seen it February 4th a couple of different places,
17 but --

18 MR. BISS: You're right. It's that -- it's what I
19 call the "QAnon followers bit."

20 THE COURT: Right. Okay. And then if I could
21 just ask you to tell me -- you know, we have the --
22 Ms. Bolger handed up to me who is who in the photo from
23 left to right. Obviously, I recognize General Flynn in the
24 middle, but -- [Stopped talking.]

25 MR. BISS: Okay, so let's go -- we'll go left to

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PROCEEDINGS

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right?

THE COURT: Yes, sure.

MR. BISS: Okay. So on the far left is Mrs. Joe Flynn. And I apologize to the Court; I don't know Joe's wife's name.

THE COURT: It's not Jack's wife?

MR. BISS: No. Then there's Joe Flynn, General Flynn, General Flynn's wife, and then my clients are --

THE COURT: Okay, so your clients are on the far right, okay.

MR. BISS: My clients are on the far right.

THE COURT: Great. Thank you. Okay. Thank you, Mr. Biss.

MS. BOLGER: Your Honor, may I --

THE COURT: Yes, please do.

MS. BOLGER: So first of all, your Honor, the two cases whose names I embarrassingly could not remember --

THE COURT: Yes.

MS. BOLGER: -- the first is *In Re Yukos Oil*, which is a Southern District of New York case from 2006, 2006 Westlaw 3026024.

THE COURT: Wait, wait. A little slower.

MS. BOLGER: Sorry, it's 2006 Westlaw 3026024. And, your Honor, that is the case that says, "This Court

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PROCEEDINGS

46

need not accept as true any allegations that are contradicted by documents deemed to be part of the complaint or materials amendable to judicial notice."

THE COURT: Okay. Thank you.

MS. BOLGER: Relatedly, your Honor, the case I talked about in which Judge Abrams recognized Tweets not included in the complaint is *Ganksy v. Menson*, 480 F. Supp. 3rd 542, Southern District of New York, from last year. And, your Honor, I do want to mention that if you put those two ideas together, there is no question that you should be taking judicial notice of the Jack Flynn Twitter feed in its entirety because not only does Jack Flynn rely on it by putting it in the complaint, but he actually suggests that somehow defendants magically knew of its entire existence, and that's why they acted with actual malice.

THE COURT: Okay. Thank you.

MS. BOLGER: I want to talk quickly about substantial truth. And your Honor I know is viewing this on a 12(b)(6) motion. First of all, your Honor, as I said, I think you can look at all of these documents on the 12(b)(6) motion. But also, your Honor, the plaintiff is flatly wrong when he tells you I bear any burden on this motion. And that's what *Tannerite* and *Cabello v. Rondon* did in the Second Circuit. That's different from *LaLiberte* and

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PROCEEDINGS

47

it's different from *Palin*. What *Tannerite* and *Cabello-Rondon* did was say that the plaintiff at the pleading stage bears the burden of proving facts that provide a plausible basis to believe the defendants engaged in wrongdoing.

So, your Honor, it's not just you can throw up some words out there; they have to plausibly plead facts that support the allegations of wrongdoing. And, your Honor, for all the reasons we say in our papers, including -- and, your Honor, I know that Mr. Biss dismisses it -- this is a giant letter Q with the words, "Where we go one, where we go all," that Jack Flynn chose to re-Tweet on August 21st and posted on his Twitter feed. And, in addition, on the 14th -- I'm sorry -- Exhibit 14 -- 12, Jack Flynn re-Tweeted a Tweet that says, "QAnon is not violent or a conspiracy; we are everyday people seeking truth. I'm a family man. I'm educated and run my own business. I work hard and spend my spare time with my family. I enjoy golf and reading. QAnon. Share and tell your story." That's something Jack Flynn himself chose to re-Tweet under his own name on Twitter. If you look at the information posted on Twitter, it confirms that the Flynn's will never be able to prove that this story is materially false on the *Tannerite* standard. *Tannerite* says it has to be the plaintiff that proves facts that are plausible. These

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PROCEEDINGS

48

Tweets, which are clearly incorporated either in the complaint itself or by reference, make it impossible for the Flynn's ever, ever to be able to get over that *Tannerite* standard.

And I wanted to mention two cases that are in our briefing.

THE COURT: Yes.

MS. BOLGER: One is the *Lovejoy* case, which is about an affiliation with the Nazis. And the other is the *Bustos* case, which is about affiliation with the Aryan Brotherhood. And, actually, I think the *Lovejoy* case is helpful. The *Lovejoy* case is actually from 1948. In 1940 it was really bad to be called a Nazi, just as in February of 2021, the plaintiff is alleging it was worse to be QAnon than it was when Jack Flynn voluntarily associated himself with it in July. Right? What the *Lovejoy* case says is even if you don't want to be associated with the Nazis now, you yourself said you appreciated the German army and think they treated our troops well. You associated yourself with the Nazis. Even if they got worse or even if you don't agree with them now, you stood up to be counted. And they said that in 1948 -- right? -- the same time difference. So I think *Lovejoy* is really important here.

I don't quite understand the timeliness issue. If

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PROCEEDINGS

49

someone endorses Q in July of 2020, they endorse -- then it is substantially true for all purposes. You don't -- there's no timeliness on the substantial truth requirement. And, your Honor, of course, Jack Flynn disabled his Twitter account, so we don't have anything after January 8th. But he was Tweeting supportive things for QAnon throughout 2020.

And I do want to say, your Honor, a couple of things about actual malice and the fact that Jack Flynn actually re-Tweeted this video itself. First of all, there's no case that I know of that says it's negligent per se not to call for comment. I don't think that case exists. But, your Honor, if CNN had looked in the world to see what Jack Flynn and Leslie Flynn said about QAnon, what they would have found was the video Jack Flynn Tweeted himself saying take the oath; they would have found a massive letter Q with the words, "Where we go one, where we go all"; they would have found in Exhibit 12 a picture that he Tweeted out of his brother saying, "The Great Awakening," which is another QAnon slogan. No amount of diligence or lack of diligence would have changed what CNN said because it would have confirmed the truth of what they published.

I'm a little all over the map, so let me talk

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PROCEEDINGS

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briefly about the other arguments he made about actual malice. The first is he says CNN made it up. That allegation's obviously not enough to satisfy the *Iqbal* plausibility standard. You would need facts that support the conclusion that they made it up.

In addition, he says they edited the video. Well, editing a video is actually editorial choice. That's protected under the First Amendment. That's a case called *Miami Herald v. Turnillo*. Plaintiff would have had to have pled facts that supported the allegation that that was done maliciously to be actual malice. Right? He would have had to plead some facts.

In addition, the idea that he claimed that it was sensationalized, one, he would need facts to support that as in, you know, on this day so-and-so did this thing that made it sensationalized. And more than that, sensationalizing the news is not evidence of actual malice. That's the *Kipper* case in the New York Court of Appeals.

And the last is, your Honor, I didn't say bias could never be calculated in actual malice. I said political bias cannot be. And, your Honor, all they allege in the complaint is that CNN are Democrats, so they made this up. And, your Honor, that is directly rejected in the *Arapaho* case and in the *Dershowitz* case in the Southern

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PROCEEDINGS

51

District of Florida.

THE COURT: Okay.

MS. BOLGER: Last thing, last topic, I guess, is the defamation per se and special damages. Gertz has nothing to do with special damages. So what Gertz did was talk about actual damages.

THE COURT: Right.

MS. BOLGER: Actual damages are not special damages under Rhode Island law. The law is real clear in Rhode Island, and it's not what Mr. Biss just articulated, although he did describe Gertz's actual damages analysis. In Rhode Island defamation per se -- you have to plead defamation per se, which has to have a business injury. If you don't do that, you must plead actual economic damages. And that's the *Sequin* case in our brief. And, your Honor, that's the words, "actual economic damages." So emotional damages aren't actual damages, and Gertz can't change that. Right? The *Sequin* case establishes the Rhode Island special damages requirement that the plaintiff hasn't satisfied.

And, your Honor, the discussion of death threats kind of brings to mind what really is the problem here. There's no reason to believe that Mr. Flynn got death threats when CNN published it but not when he published it,

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PROCEEDINGS

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right? Jack Flynn published to the world that he said [indiscernible], "Where we go one," and "God Bless America." He published that to the world. Those are his words. CNN didn't even repeat that but showed a clip of that footage. It's the same thing. It can't defame him when CNN does it but not defame him when he not only Tweets it but asks for it to be re-Tweeted and consistently re-Tweets Sydney Powell talking about how we should all take the oath. It's Mr. Flynn's words re-Tweeted over and over because he was promoting that he took the oath. It is not defamatory when CNN truthfully publishes what Mr. Flynn did.

THE COURT: Can we talk about the *Bustos* case for a second? I've spent some time looking at that. You mentioned it earlier.

MS. BOLGER: Yes.

THE COURT: So there, you know, Justice Gorsuch, when he was sitting on the Tenth Circuit, looked at what -- similar to this case in some ways, where the inmate, the plaintiff in that case, was shown in a video that was talking about the Aryan Brotherhood, and he alleged, well, I'm not part of the Aryan Brotherhood. And what Justice Gorsuch focused on was, well, you say that, but you sent them letters and you took heroin from them and you praised

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PROCEEDINGS

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them, and all those other things. So those were kind of what Justice Gorsuch was focusing on was specific acts. What I don't see here, aside from Tweeting, which obviously is -- it is an act, but it's more of a statement -- I don't see any -- there's no allegations -- and CNN hasn't pointed to anything, although this may be the sort of thing that will come out in discovery, them going to QAnon meetings or going to rallies or being there on January 6th or anything like that that takes the step farther from just Tweets. And so that to me seemed to be a difference between *Bustos* and this case. And it was at a different posture, too, I think, but -- [Stopped talking.]

MS. BOLGER: So I actually disagree with your Honor. So, first of all, it is a different posture. But there's a reason it's a different posture. Right? So it was after summary judgment -- it is a summary judgment. But, your Honor, *Tannerite* didn't exist at the time, and *Tannerite* didn't govern *Bustos*. Right? I'm suggesting, your Honor, because it's the law, that *Tannerite* and *Cabello* are different in New York, in the Second Circuit. Right? We have an explicit requirement that the Second Circuit has been very clear that you must at the pleading stage plausibly allege facts that support the inference. Right? So *Tannerite* governs --

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PROCEEDINGS

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THE COURT: We're in Rhode Island, though. Does that still govern?

MS. BOLGER: Well, you're not in Rhode Island.

THE COURT: Well, but it's Rhode Island law that we're applying, so do I have to follow what the Second Circuit --

MS. BOLGER: I think you would have to follow Second Circuit on the standard of care required to get over a 12(b)(6) motion, yes, your Honor.

THE COURT: Well, on 12(b)(6), yes. But on --

MS. BOLGER: That's what *Tannerite* and *Cabello* are about; they're the standard you must show, what you must allege on a 12(b)(6) motion. That is what *Tannerite* and *Cabello* are about. Right? So, yes, your Honor, I do think they govern.

But the other thing is -- the difference, I think, between *Bustos* and here is that the allegations in the complaint -- so the only reason that the plaintiffs have had to acknowledge the existence of these Tweets is because I wrote them a Rule 11 letter attaching them. Right, your Honor, every single one of those Tweets is in this complaint because I said to the plaintiff, Go back and look at your Twitter feed, because you're supporting QAnon. That's how they got into the complaint. And you can see

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PROCEEDINGS

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that by comparing the first complaint and the second complaint.

The plaintiff is the person who has said if you look at my Twitter feed, you would see I was pellucidly innocent. Right? That's in the complaint itself. And I think that's different than *Bustos*. *Bustos* was talking about things that could only be discovered in discovery. They weren't talking about the things that were actually integral to the complaint itself. The plaintiff has put into issue what he said on Twitter. And that should be enough to undercut his ability to carry his burden under *Tannerite*. Right? He's got the burden of pleading facts that prove falsity. He has said his Twitter feed makes him pellucidly innocent. But that's not right.

THE COURT: Right. But, obviously, *Bustos* got past the motion to dismiss and got to discovery, and it went to summary judgment.

MS. BOLGER: We don't even know if there was a motion to dismiss, your Honor.

THE COURT: Well, okay, he got past the pleading stage, so --

MS. BOLGER: But *Tannerite* didn't exist, right, your Honor? So that's one thing. And the other thing is I guess he got past the pleading stage, your Honor, but I

1 PROCEEDINGS 56

2 don't know if there was even a motion.

3 THE COURT: All right, okay. Anything else?

4 MS. BOLGER: Oh, the other thing, of course, is
5 that there's nothing in the report that talks about the
6 words "extremism" or "violence" or "insurrection" or any of
7 those words are not actually in the reports. What the
8 plaintiff is doing is imposing them from that Anderson
9 Cooper discussion on January 31st. But, of course, they're
10 not in the report --

11 THE COURT: Well, they don't say that, but there
12 are pictures of the riot on January 6th. There's about a
13 minute of footage of January 6th in the video.

14 MS. BOLGER: But they certainly don't call the
15 plaintiffs extremists or violent or racist in an overt way
16 in the report. The words just aren't there.

17 THE COURT: The words aren't there, but I mean,
18 the images are there.

19 MS. BOLGER: The images don't include the
20 plaintiffs, your Honor.

21 THE COURT: It's a three-minute video. The
22 plaintiffs are in the video, and there's a minute of
23 January 6th in there. It's hard to parse that out.

24 MS. BOLGER: I think that actually the
25 requirement that you parse the report as a whole means that

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PROCEEDINGS

57

you can't just say well, because their image is there, it's calling them everything in the video. Right? You're required to parse what the video actually says about the plaintiff as opposed to the video. That's --

THE COURT: But the picture is there, and it says "QAnon follower" below it. You keep switching back and forth. One minute you want me to look at the whole video; the next minute you want me to only look at what was --

MS. BOLGER: We want you to look at the whole video, your Honor. I always want you to look at the whole video. I want you to look at the whole video because, one, you're required to under the law that says that you're required to do that, *Mann v. Abel*, right? That's the -- and the *Bray* case. That is the rule; you are required to look at the whole video. But the of-and-concerning analysis looks to whether the defamatory statements are of and concerning the plaintiff. It's not whether the plaintiff is just in the video; it's what the video says about the plaintiff. And I would argue, your Honor -- and I know I'm not convincing you -- that the video only -- the only thing the video says about the plaintiffs is that they were standing next to Michael Flynn, nothing else.

THE COURT: All right, yes, you're right; you're not convincing me on that.

1 PROCEEDINGS 58

2 Mr. Biss, any last word before we wrap up?

3 MR. BISS: No, your Honor.

4 THE COURT: Okay. Could I ask the parties to
5 please order a transcript of today's argument and get that
6 to me as soon as possible? We'd like to get a decision out
7 to you shortly.

8 MS. BOLGER: Certainly, your Honor.

9 THE COURT: And I don't know if there -- I think
10 the cases that you mentioned you either gave me the cites,
11 but if there are any other cites that you want me to
12 consider, just -- on Monday just submit a letter with any
13 cites that either side --

14 MS. BOLGER: Your Honor, I happen to have all of
15 the case -- many of the cases --

16 THE COURT: Perfect. I have them all --

17 MS. BOLGER: -- if you want --

18 THE COURT: No. I have them all. Thank you.

19 So either of you, if there are any other cases
20 that you mentioned or you think of after this, just get
21 those to me by Monday. Okay?

22 All right. Thank you, both. We're adjourned for
23 today. Have a good afternoon.

24 (Whereupon, the matter is adjourned.)

25

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Flynn et al v. Cable News Network, Inc., Docket #21-cv-02587-GHW-SLC, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Date: October 18, 2021